

1 UNITED STATES DISTRICT COURT FOR
2 THE DISTRICT OF MASSACHUSETTS

3
4 UNITED STATES OF AMERICA,

5 Plaintiff,

6 vs.

7
8 REYNALDO RIVERA,

9 Defendant.

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) Criminal Action
) No. 04-10336-NMG
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11 TRANSCRIPT OF SENTENCING

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13 BEFORE THE HONORABLE NATHANIEL M. GORTON
14 UNITED STATES DISTRICT JUDGE

15
16 United States District Court
17 John J. Moakley U.S. Courthouse
18 1 Courthouse Way
19 Boston, Massachusetts 02210
20 June 22, 2007
21 3:45 p.m.

22 * * * * *

23 SHELLY M. KILLIAN, RPR, CM, CRR
24 Official Court Reporter
25 John J. Moakley U.S. Courthouse
1 Courthouse Way, Room 3510
Boston, MA 02210
(617) 737-7117

1 APPEARANCES:

2 For the Plaintiff:

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P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Nathaniel M. Gorton, United States District Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, 1 Courthouse Way, Boston, Massachusetts, on June 22, 2007.)

The defendant, Reynaldo Rivera, is present with counsel. Assistant U.S. Attorney William Bloomer is present.)

THE CLERK: All rise. United States District Court for the District of Massachusetts, Court is now in Session. For sentence, criminal matter 04-10366, United States versus Reynaldo Rivera.

Would counsel please identify themselves for the record.

MR. BLOOMER: Good afternoon, your Honor. William Bloomer for the United States.

THE COURT: Good afternoon, Mr. Bloomer.

MR. DONALDSON: Good afternoon, your Honor. Carl Donaldson for Mr. Rivera.

THE COURT: Mr. Donaldson, Mr. Rivera. And we have a court interpreter. If he would introduce himself, please.

INTERPRETER: Gabriel Haddad.

(Gabriel Haddad, Interpreter, sworn)

THE COURT: And we have Miss Rofo, is it, from Probation?

1 PROBATION OFFICER: Yes.

2 THE COURT: Please be seated. We are here on the
3 sentencing of Mr. Reynaldo Rivera, and I have received and read
4 the presentence report, the government's sentencing memorandum
5 and the defendant's memorandum in aid of sentencing.

6 Is there anything that I haven't mentioned that I
7 should have received in writing, Mr. Bloomer?

8 MR. BLOOMER: Nothing from the government.

9 THE COURT: Mr. Donaldson?

10 MR. DONALDSON: Nothing from the defense, your
11 Honor.

12 THE COURT: All right. Then as I understand it, we
13 obviously need to go through this three-prong process, the
14 first of which is to establish the appropriate guideline range
15 and then to consider whether any departures are warranted or
16 any matters under 3553(a) would warrant a variance to a
17 guideline sentence. I understand there have been a few
18 objections filed by both the government and the defendants to
19 the presentence report. And basically they all turn on, first,
20 the amount of drugs to be attributed to this defendant,
21 Mr. Rivera, and then his role in the offense, whether or not a
22 three-level increase should be granted or attached on the basis
23 that Mr. Rivera was a manager of a substantial criminal
24 enterprise.

25 As I understand it, the government has informed the

1 Court that it believes the amount of drugs that Mr. Rivera
2 should be charged with is the lower amount, that is, between
3 400 and 700 grams of heroin rather than in excess of 700 grams,
4 but that the Court -- the government apparently believes that
5 the amount is so close to 700 that it could go either way.

6 Is that correct?

7 MR. BLOOMER: That's right, your Honor. It's right
8 on the cusp of 700 grams. And where this was a case, as this
9 Court recalls, there were 12 defendants and there was a log jam
10 in that no one had pled guilty and with the exception of a
11 couple of defendants as the trial approached. And I felt that
12 the weight of the heroin was so close to 700 that perhaps the
13 benefit of the doubt would cut in favor of the defendant under
14 United States v. Sklar.

15 THE COURT: And which of the particularly
16 attributed amounts of drugs would the government suggest brings
17 it back down to close to the 700 gram level?

18 MR. BLOOMER: Well --

19 THE COURT: Because apparently if you add them all
20 up, it's 735. So you're only 35 grams into that category.

21 MR. BLOOMER: Only 35 grams into the category. The
22 one -- I think it was paragraph 90 where it described
23 Mr. Torrado -- a 50-gram pickup that was apparently
24 Mr. Santiago used Mr. Rivera's truck in order to leave some
25 drugs for Mr. Torrado. There was no indication about, you

1 know, the defendant knew how much drugs were going to be put
2 there, what type of drugs or who was going to pick them up. It
3 was just can I use the office, meaning the car, and Rivera said
4 yes. So it was kind of ambiguous. If there was one
5 transaction you could say you can deduct, that would be it.

6 THE COURT: All right, thank you.

7 Mr. Donaldson, do you wish to address that issue?

8 MR. DONALDSON: Yes, your Honor. If it please the
9 Court.

10 THE COURT: Yes, you may.

11 MR. DONALDSON: With respect to the 50 grams that
12 the government has just discussed, it wasn't any drugs, I
13 believe, that was left in the office. He said he needed him to
14 facilitate or that he wanted his friend to meet him -- his
15 friend being Torrado -- to meet him up on the hill. I believe
16 that's the way it was established. And that he told him that
17 he had been waiting all day to receive those but that he would
18 leave some food for, speaking in terms of drugs, that he would
19 leave some food for him but that never took place. So that was
20 the 50 grams.

21 THE COURT: That was the one on September 30th?

22 MR. DONALDSON: That would be September 30th,
23 2004. I didn't put that in my memorandum because I knew that
24 the drugs was more than 400, but I knew assuredly that it was
25 less than 700. There was at least two or three other issues

1 that I brought to the Court's attention with respect to 80
2 grams that there was a negotiation between Zuleima Reyes,
3 Mr. Rivera and Detective Chavez, the undercover agent.

4 THE COURT: That was the February 12th incident?

5 MR. DONALDSON: Yes.

6 THE COURT: And they were discussing how much he
7 could purchase the drugs for. And the three of them agreed
8 upon a price but no drugs were ever purchased. There was never
9 any meeting when they were going to get together to sell drugs,
10 any of that -- any of those things took place.

11 Also, your Honor, I pointed out on October the
12 15th, 2004 when the officers arrested Zuleima Reyes, they found
13 39.7 grams -- 39.6 grams at her residence. And she said she
14 was holding those there for Rey. I would like to take
15 exception to that for two reasons. If the government -- I
16 mean, if the Court would believe that the 39.7 grams was in
17 fact being held for Rey -- for Mr. Rivera, then that is close
18 enough to the date of the purchase of the other grams of
19 cocaine -- not cocaine, heroin. Excuse me, your Honor.
20 Because on the -- I believe it was the 14th there was a
21 purchase of 140 --

22 THE COURT: 180.

23 MR. DONALDSON: Well, there was 180 seized from
24 Mr. Rivera's address. And I believe that there's a level of
25 double counting there. For example, there was a -- there was

1 a -- on the 13th there was a purchase of a hundred -- I want to
2 make sure I have it right, your Honor. I have to go back to my
3 note. On the 13th there was a purchase for 140 grams. And
4 then they found another 18 grams at his house on the 10th -- on
5 the 15th of August.

6 THE COURT: Okay. But he wasn't attributed that
7 first 140. At least according to the presentence report, in
8 paragraph 133 he is held accountable only for the 180 that was
9 seized at the residence.

10 MR. DONALDSON: Right. And my suggestion is is
11 that if -- but there was -- there was -- on 9/20/2004 there was
12 also a person who bought 120 grams. My argument is you could
13 look at it both ways. It could -- that 120 grams could be in
14 the 140 grams. And the 39 -- that 39.7 grams, if she was
15 holding it for Mr. Rivera, could be part of --

16 THE COURT: I understand your point.

17 MR. DONALDSON: Okay. The other issue is that with
18 respect to this 39.7 grams is cut another way, your Honor,
19 there is discussions on October the 29th -- I'm sorry, January
20 the 29th, 2004 between Detective Chavez and Zuleima Reyes that
21 Mr. Rivera and her were no longer working together and that she
22 was on her own, that he had nothing to do with any more of
23 those sales. And she was -- and he was to deal directly with
24 her. And that occurred on the 29th. On the 30th of January he
25 purchased 30 grams of heroin from Miss Reyes. They're also

1 attributing that 30 grams to Mr. Rivera as well. And then
2 gathering those calculations would be the 80 grams, the 30
3 grams, the 39.7 grams, and the 50 grams would come up to
4 approximately 249 grams off the 736 grams, which, again, we're
5 still in between the 400 and 700 range, but we're not over the
6 700 range.

7 THE COURT: I understand. I understand your
8 position. Well, the Court believes that there is enough
9 ambiguity in the attribution of the amount of drugs
10 attributable to Mr. Rivera that the -- under a preponderance of
11 the evidence standard the Court will find that the amount
12 attributed is under 700 grams but just barely. It seems to me
13 it's very close to 700 grams. I do not accept all of the
14 claims of Mr. Donaldson on behalf of the defendant, but I do
15 accept the fact that there is enough ambiguity on several of
16 them so that the Court would be best guided by finding the
17 amount of drugs between 400 and 700 grams. I do for the
18 record, however, note that the Court believes it's much closer
19 to 700 than 400. And, therefore, I am not accepting the
20 probation department's recommendation. And that means that
21 under Guideline 2D1.1, which is the appropriate guideline that
22 we're dealing with here, and particularly the 2006 manual which
23 is the one that is recommended that we use, the appropriate
24 base offense level would be 28 rather than the recommended 30.

25 There is now also an objection by the defendant to

1 the attribution of the three-level increase for the role in the
2 offense under 3B1.1(b). There seems to be ample evidence that
3 the Court is aware of that Mr. Rivera was, in fact, a manager
4 or supervisor and that he supervised one or probably most
5 likely two others who were involved in this very extensive 12
6 or more persons conspiracy to distribute heroin in the Lowell,
7 Massachusetts area.

8 I've read your response to that, Mr. Donaldson, and
9 I'll be glad to hear you if you wish to amplify your argument
10 in that regard.

11 MR. DONALDSON: Thank you, your Honor. If it
12 pleases the Court.

13 As your Honor is aware, your Honor has already
14 stated that you find that there's ample, so I'm not going to
15 belabor the point because I don't want to in any way appear
16 that I'm disrespecting the Court.

17 THE COURT: You're entitled to your opinions,
18 Mr. Donaldson, and you can express them.

19 MR. DONALDSON: Okay, thank you, your Honor.

20 Number one, there is nothing in the record and with
21 respect to the exhibits that I gave you that showed that there
22 was any other -- any more of a decision-making authority over
23 either one of the two individuals. That would be Arroyo or --

24 THE COURT: Reyes.

25 MR. DONALDSON: Reyes. And there is nothing in the

1 record that indicated that Mr. Rivera recruited those two
2 individuals, and there's nothing in the record that indicated
3 that he got or received a larger share of the profits with
4 respect to those limited sells. There's nothing in the record,
5 your Honor, that would indicate he had any degree of control or
6 authority over either one of those two individuals.

7 What you have, your Honor, is -- if I can deal with
8 Mr. Reyes first. Of the exhibits that I gave your Honor, it
9 indicates by the understanding of Mr. Chavez that Miss Reyes
10 was in fact Mr. Rivera's girl friend. They were in a
11 boyfriend/girl friend relationship. And oftentimes, especially
12 in these types of relationship, the business, they were
13 partners, your Honor. They were partners. There is no
14 street-level dealer who is going to give a source to a -- give
15 a wholesale source -- give a source to their supplier and cut
16 out their profit in that overall scheme.

17 In other words, what I'm saying is that if I'm the
18 street-level dealer and I'm being supervised or managed by my
19 supplier or my boss, I'm not going to -- because the only way
20 I'm going to make my money is if I go out and sell the drugs,
21 you know, what I get for them, I'm not going to take one of my
22 clients and introduce them to my boss and tell my boss, look,
23 this guy wants to buy large amounts of drug, what kind of price
24 are you going to give him? And even if that was the case,
25 there is no indication that Mr. Rivera paid her any money or

1 recruited her to do that.

2 There is no indication that Mr. Rivera controlled
3 that whole situation. It's more that Detective Chavez -- of
4 course that's his job. He controlled the situation along with
5 Mr. Rivera because she wanted, as a general partner would do
6 with another person you're in business with, is to say, look,
7 how much can we sell these drugs to this person for? And they
8 calculated what the drugs should be sold for. And that was
9 consistent.

10 And if you look at some of the other discussions in
11 there with respect to Mr. Rivera and Mr. Santiago, one of the
12 of individuals who went to trial on this case, he asked her
13 about Mr. -- and he specifically asked Mr. Rivera about Miss
14 Reyes, and Mr. Rivera said we're not friends anymore. And she
15 had indicated that earlier back in February that they weren't
16 together anymore as well. But they actually had a business
17 relationship and they were partners in that business
18 relationship.

19 It appears based upon the sales, your Honor,
20 that -- and it would appear at first glance that Mr. Rivera was
21 a supervisor/manager over these two individuals or especially
22 Miss Reyes. But then that would cut against, you know, women
23 who are out here in this business as well. They're just as
24 smart and just as intelligent. And it would cut against -- I
25 would -- I would compare that to being a chauvinistic approach

1 to say that every woman who's involved with another person in
2 drug transactions that they, you know, are always going to be
3 the subordinate of the man. Sometimes there are women who are
4 in these relationships and they are managers and supervisors.
5 But in this particular situation they were co-partners in their
6 endeavor.

7 On the other hand, your Honor, you have the one
8 sell, Mr. Arroyo, back in December of 2003. Mr. Arroyo in
9 December of 2003, basically he gets -- Detective Chavez makes a
10 telephone call. He says that it's Mr. Rivera but he doesn't
11 know for a fact that it's Mr. Rivera. He just assumes that
12 it's Mr. Rivera because he has access to the telephone number.
13 And later on that -- after that Mr. Rivera comes -- not
14 Mr. Rivera, Mr. Arroyo comes and makes the sale. There's no
15 indication that Mr. Rivera recruited him to make that sale,
16 there's no indication that Mr. Rivera paid him to make that
17 sale, there's no evidence on -- on the -- on the other hand
18 either that he was just doing that as a favor for Mr. Rivera.
19 There's no indication that Mr. Rivera -- that he actually even
20 worked for Mr. Rivera other than any maybe self-serving
21 statements that Arroyo said after he was arrested just to place
22 the blame on someone.

23 But the facts taken into consideration, the total
24 circumstances of this transaction, if he worked for Mr. Rivera,
25 that would not only be the first time that he was able to work

1 for him. He would have worked on him in other indications.
2 There's no indications after all the phone taps and, you know,
3 the pager taps that there would be some communications between
4 Mr. Arroyo and Mr. Rivera. There is none. So it doesn't
5 indicate that he actually recruited him or even that he worked
6 for him or that he even had control over this individual.

7 What Mr. Rivera was was a distributor. He sold
8 drugs; he bought drugs. Sometimes if Mr. Santiago needed to
9 have some contact with Mr. Torrado, he'd ask him where
10 Mr. Torrado was but only because Mr. Torrado and Mr. Rivera was
11 friends. But Mr. Torrado cut his own deal with Mr. Santiago as
12 well. And that's what we have here.

13 So under these circumstances, your Honor, I would
14 not suggest that by a preponderance of the evidence that
15 Mr. Rivera was a manager. I would suggest that he was no more
16 than a middle man who was out there trying to make as much
17 money as he could, and he did not under those circumstances
18 have anybody working for him because he was taking the most
19 money for himself.

20 THE COURT: Thank you, Mr. Donaldson.

21 Mr. Bloomer?

22 MR. BLOOMER: My wife would be upset if I sought a
23 role enhancement because I was a chauvinist. I would limit
24 myself to the evidence and that is that the undercover agent
25 negotiated a sale with Mr. Rivera, Mr. Rivera sent Mr. Santiago

1 Arroyo to consummate the sale. Whenever the undercover agent
2 sought a price reduction or sought a large amount of heroin,
3 Miss Reyes said she had to check with her guy and at one point
4 referred to him as her boss and then reached out to Mr. Reyes.
5 The fact --

6 THE COURT: You mean Mr. Rivera.

7 MR. Bloomer: Mr. Rivera. I'm sorry. The fact
8 that they had a relationship as well doesn't mean that he can't
9 be her supervisor. The evidence shows that he supervised Miss
10 Reyes, sent her to consummate the deals, and whatever
11 negotiations went through Miss Reyes had to get Mr. Rivera's
12 permission or authority to either lower the price or to get
13 large amounts of heroin.

14 I just want to clarify one thing. Mr. Donaldson
15 indicates that Miss Reyes said she was no longer with him or
16 dealing with Mr. Rivera. The evidence is that when they were
17 negotiating the 80-gram delivery, there was -- there was some
18 negotiation about the price. Ms. Reyes, the information showed
19 contact with Mr. Rivera; Mr. Rivera then showed contact with
20 Mr. Santiago. Mr. Santiago then came to Mr. Rivera's house.
21 There was conversation that they were all set for the deal.
22 And because we had had enough information to get a wiretap and
23 we didn't want to spend another X thousands of dollars, we
24 cancelled the sale. There was an indication in subsequent
25 conversations that Ms. Reyes and Mr. Rivera were very upset

1 that that sale was cancelled and that ultimately it ended with
2 a call we're not doing that anymore. Click. That was the call
3 Mr. Donaldson was referring to in February. After that we went
4 up on wires.

5 So I would suggest clearly by a preponderance of
6 the evidence he's worthy of a role enhancement.

7 THE COURT: Mr. Donaldson?

8 MR. DONALDSON: If I may, your Honor. As
9 Mr. Bloomer indicated that they were upset, it wasn't that
10 Mr. Rivera was just upset. I'd also like to point your Honor
11 to 3B1.1 comment note 4, which indicates that, you know, terms
12 such as boss or leader, of that nature, terms of that nature
13 are not controlling with respect to these issues as it relates
14 to roles --

15 THE COURT: They're not controlling but they are
16 evidence, are they not, Mr. Donaldson?

17 MR. DONALDSON: They are evidence, your Honor.
18 That's why I say in the totality of the circumstances, if we're
19 going to cut it one way or the other, I think a liberal reading
20 of all the evidence would indicate that he was not the manager,
21 that he was no more than a distributor.

22 THE COURT: Well, the Court respectfully disagrees
23 with defendant's counsel and finds that Mr. Rivera was, in
24 fact, a manager as that term is defined in the Sentencing
25 Guidelines at 3B1.1(b), which instructs the Court that if the

1 defendant was a manager or supervisor but not an organizer or
2 leader and the criminal activity involved five or more
3 participants or was otherwise extensive, then I am to increase
4 the base offense level by three.

5 The Court finds that Mr. Rivera qualifies as a
6 manager or supervisor in this case clearly over an extended
7 period of time, and on the basis of the preponderance of the
8 evidence standard, the Court so finds. Therefore, a
9 three-level aggravating role adjustment is made. And that
10 means that the adjusted offense level is 33. The defendant is,
11 in turn, entitled to a three-level downward adjustment for
12 acceptance --

13 MR. DONALDSON: Excuse me, your Honor. I
14 apologize. You said the adjusted level would be 33.

15 THE COURT: I misspoke. It should be 31. Thank
16 you, Mr. Donaldson. Because we started at 28. I stand
17 corrected. We go from 28 to 31 for the adjustment in the role
18 in the offense and then back to 28 for a three-level downward
19 adjustment for acceptance of responsibility, and that's the
20 total offense level that the Court finds.

21 There is no criminal history, or at least no
22 recorded convictions, and therefore the defendant falls in
23 Criminal History Category I. And that means that for the
24 purposes of the guideline at 28-1, it would be a 78 to 97-month
25 range for sentencing.

1 I will hear counsel. I understand there are no
2 motions for a departure under the guidelines. Is that correct,
3 Mr. Donaldson?

4 MR. DONALDSON: Well, your Honor, I wasn't asking
5 for a departure. I was asking for a variance.

6 THE COURT: I understand. We will get to that, but
7 I need to go through the steps.

8 And the government doesn't have anything with
9 respect to departure, correct?

10 MR. BLOOMER: No.

11 THE COURT: Now, Mr. Donaldson I'll hear you as to
12 why I should vary this sentence from the guideline sentence if
13 you wish to address that issue.

14 MR. DONALDSON: Okay. Your Honor, there are
15 several reasons why I'm asking the Court to vary the sentence
16 and take it out of the base offense level of 28. The first
17 reason, your Honor, and I think that I can deal with this issue
18 quite succinctly, is the issue that as I pointed out in my
19 memorandum, there was some time in February of -- I want to say
20 2005 -- it was --

21 THE COURT: The incident was in '04. He was
22 arrested in October of '04.

23 MR. DONALDSON: Right. I want to make sure that --
24 2006, your Honor. I have been in some discussions, basic,
25 rudimentary discussions with the government about Mr. Rivera

1 cooperating with the government with respect to opportunity for
2 a 5K1 departure. And I advised him that I would get back to
3 him. We did have a scheduled meeting for, I believe, sometime
4 around February 4th or sometime in that area. But during that
5 period of time, I can't remember exactly, but there was a huge
6 snowstorm and there was a lot of things that had closed down.
7 Our schedules kind of conflicted, and then sometime in March of
8 2006 is when the police officers came to Mr. Rivera's house,
9 entered his house under the pretext that they had heard of some
10 complaints.

11 At that point in time, Mr. Rivera was at home alone
12 with his now 6-year-old child. They took Mr. Rivera, separated
13 him from his 6-year-old child, took the 6-year-old child
14 upstairs into the bedroom by himself and I think either one or
15 two other agents. And there was another three or four agents
16 that stayed downstairs with Mr. Rivera and continued to
17 question Mr. Rivera, can you buy drugs for us? Can you get
18 drugs for us? We want to get some drugs. How soon can you get
19 some drugs for us? And at all times he kept telling them that
20 he was on probation, he doesn't do that stuff, he's on house
21 confinement with the exception of going to work, if they have
22 any questions, they should be contacting his attorney. He
23 called me incessantly the whole time that everything was going
24 on because he had his phone underneath the table, he kept
25 redialing my phone.

1 When I came out of my meeting I looked at all these
2 calls, I called him and asked him what was going on. He told
3 me just what I just told you. I called pretrial probation
4 services. I questioned pretrial probation services. The
5 probation officer was Chris Wylie at the time. I asked him why
6 are you sending police officers out to my client? And he says
7 he doesn't know anything about it. So he said he would contact
8 the necessary people and get back with me and let me know.
9 Needless to say, the police officers at that point in time,
10 state, federal were not honest with him as well.

11 THE COURT: They were not what?

12 MR. DONALDSON: They were not honest with Mr. Wylie
13 as well. They gave him no information. At this point in time
14 the mother and father and the wife of Mr. Rivera came home
15 because that's where he was living. Under the terms and
16 conditions of pretrial probation, he was to stay with his
17 parents. They came home. Everybody was scared at this point
18 in time. Mr. Chris Wylie had no indication, couldn't tell us
19 whether or not these were police officers or whether they
20 weren't because as far as Mr. Wylie was concerned, they weren't
21 police officers because all of the authorities that he
22 contacted, including the Lowell Police Department, the State
23 Police barracks and all around, no one gave him any information
24 to ensure him that that was a police activity. So at that
25 point in time Mr. Wylie made the decision in fear of the safety

1 of Mr. Rivera, his two children, his wife, his father and his
2 mother, removed them from the house and put them in a safe
3 hotel for over the weekend until we were able to conduct an
4 investigation that following Monday to determine what was
5 happening.

6 Needless to say, your Honor, that type of activity
7 is so outrageous that it would shock the conscience of any
8 court when a person like that is under probation, especially
9 the terms and conditions of probation where he's not to have
10 any contact with anybody. Not only that, that they knew that
11 he was represented by counsel. Notwithstanding those Sixth
12 Amendment, those basic issues, they came into his house and
13 violated his constitutional rights.

14 But there's another issue, your Honor. Mr. Rivera
15 was involved in a very, very dirty business. There's no --
16 that's why we're here, and that's why he's going to be punished
17 today. But his family, his mother and father, they didn't sign
18 up for that. He was not living with them when he was involved
19 in that business. They signed up -- they signed up with the
20 Court to supervise him and to be responsible for him while he
21 was in custody or under pretrial release. What the government
22 did was they intruded this house and basically scared the
23 living day lights out of him, scared for his children, for his
24 wife, his father and his mother to the point that Mr. Rivera
25 was chilled at that point in time whether he could even trust

1 the government, to whether he could even function under a 5K1
2 proffer because at this point in time no one was prepared to be
3 honest with him.

4 Your Honor, under those circumstances, I believe
5 that this is an atypical type of situation that would take this
6 case out of the heartland of normal cases and that he should be
7 able to be sentenced as if he was going to give a -- as if he
8 was going to cooperate with the government for purposes of a
9 5K1 departure. I didn't ask for departure because technically
10 it's not a departure if he doesn't cooperate. And then the
11 government would have to motion for that. So there's no way
12 that we could do it.

13 So my suggestion, your Honor, would be -- I'm
14 requesting a variance based upon that, your Honor. The reason
15 why I'm requesting a variance based upon that is because
16 constitutionally he was chilled from even being able to
17 participate in that process, to participate in sitting down
18 with the government, going with the government with respect to
19 how he obtained his drugs from Mr. Santiago, with respect to
20 how he sold his drugs, with respect to what he knew about
21 Mr. Santiago. The government told me explicitly that if they
22 were going to give him anything, that he would have to testify
23 against Mr. Santiago. That's the conversation that I had with
24 Mr. Rivera. That's the first issue, your Honor.

25 The second issue, your Honor, is that I believe

1 that if your Honor would take a careful consideration and take
2 a look at Mr. Rivera's age, he's 28 years old. At his
3 educational level. He graduated from high school in Puerto
4 Rico. He came to the United States with a license to perform
5 electric -- electricity duties and while he was here he got a
6 license to be a forklift driver.

7 Now, Mr. Rivera was doing electrical work and
8 forklifting duties at Kmart. He got laid off and he was living
9 with his wife and his two children. During that time, your
10 Honor, after he got laid off, he made the selfish decision to
11 go out and start selling drugs, more specifically poison in the
12 terrible drug of heroin, which is one of the most terrible
13 drugs that we all know of. It's definitely in the top two,
14 three worst drugs that anybody can take. He made that
15 self-decision. He accepted that responsibility, your Honor.
16 He said that he was guilty.

17 I enlightened him on the issues with respect to
18 when police come into your house and all that. He could have
19 done a lot of different things with respect to how when the
20 police came into the house illegally. But he didn't. He said
21 this is what happened, I'm going to tell you the truth from
22 this point forward, I'm going to be honest about everything, I
23 made the wrong decision, I caused a lot of pain with respect to
24 my children, they had to sacrifice, they didn't ask for this,
25 my wife didn't ask for it, my parents really didn't ask for it,

1 and I made these bad decisions and I'm going to stand up like a
2 man and I'm going to take responsibility for it. So he's -- at
3 this point in time he's not making any lies, your Honor. The
4 only thing he wants to do is he wants to pay for what he's done
5 and get his life straight again.

6 When I say "these things," your Honor, we take a
7 look at his record when he was out on pretrial probation.
8 Within six months while he was on pretrial probation, he was
9 allowed to have gainful employment, your Honor. While he was
10 out on gainful employment, your Honor, he worked two jobs.
11 First job he was working -- he worked delivering glass
12 windshields for cars. After that he started repairing auto
13 windshields. And his bosses took enough respect and enough
14 trust in him that they gave him that opportunity to do that.
15 And they taught him how to do that and taught him how to even
16 open up his own business if he wanted to.

17 I would also suggest, your Honor, that not only did
18 he do that but he was given the responsibility to leave his
19 house at 7:00 in the morning and to get home before 6. And he
20 had to drive all the way down to Quincy. Sometimes -- and his
21 whole area was all of Massachusetts. But no matter what, your
22 Honor, he would make sure that he did his job in a way that he
23 would get home not later than 6. And if he was going to be
24 between 6 and 6:30, notwithstanding the rush hours on these
25 highways and everything, he would always call his probation

1 officer. I'm sure your Honor saw the date of sentencing where
2 Probation Officer Wylie represented that Mr. Rivera -- let me
3 see if I have it here. I moved my stuff around when the other
4 attorneys came on the other case. I'd just like to read it for
5 the Court. If I can have just one second, your Honor.

6 THE COURT: Yes.

7 (Pause.)

8 MR. DONALDSON: Okay, your Honor. On October 16,
9 2006 authored by Christopher R. Reilly, he indicated that
10 Mr. Rivera has been in full compliance with his bail conditions
11 and checked with Massachusetts Criminal History Board there's
12 no new warrants, no new arrests while on his release. And I'm
13 saying all these things, your Honor, is to say that he started
14 his part of rehabilitation before he -- while he was out on
15 pretrial probation before he said that he was guilty. He
16 started his part of rehabilitation. And I would suggest, your
17 Honor, that in looking at the U.S. Sentencing Commission on
18 measuring recidivism, it clearly indicates that someone that is
19 in a -- between the ages of 26 and 30 years old with zero
20 criminal history points and has a very, very small chance to
21 get back in trouble, to get rearrested on issues.

22 And I would suggest, your Honor, that his is even
23 less than that because he already has licenses, he already has,
24 you know, a semi-career. You know, he knows electricity. He
25 now knows how to fix windows. And he has indicated to me that

1 as soon as he gets placed into a facility, a jail, that he's
2 going to further his education on electricity and see if he can
3 get any other type of licensing and degrees that he can get
4 while he's in there. So I would suggest, your Honor, that you
5 take that into consideration.

6 You also take into consideration, your Honor, the
7 fact that Mr. Rivera has a very, very strong family -- knit
8 family group. His mother and his father have supported him a
9 hundred percent through this whole process. His wife is still
10 here through this whole process. Again, this happened back in
11 2004. She's aware that, you know, he was involved with a
12 relationship with somebody else during that period of time when
13 they were selling drugs, but she is there for him and she's --
14 and they're still together as husband and wife. And, you know,
15 he has that financial support as well as the emotional support
16 that he needs to be when he comes out to be a good, strong
17 citizen so that he can come out and work without having to
18 worry about getting in trouble.

19 I'm sure that his family -- and his father's
20 already indicated to me that, you know, he would do anything
21 that he can to make sure that when Rey does come out of jail,
22 that he is going to ask his boss to give him a job or at least
23 try to, you know, put him in touch with other individuals that
24 are in positions that can help him find gainful employment when
25 he gets out.

1 THE COURT: Thank you, Mr. Donaldson.

2 Mr. Bloomer?

3 MR. BLOOMER: I'm not sure where to begin, your
4 Honor. I don't know if the Court wants to --

5 THE COURT: What about this incident in February of
6 '06. How does the government respond to that having an impact
7 on this sentencing?

8 MR. BLOOMER: I have no idea how it has an impact
9 on the sentencing. It's been my position all along that that
10 is irrelevant, it had no impact -- this is not the forum, this
11 is not the proceeding to address that. Mr. Donaldson said that
12 we had basic rudimentary discussions about a possible plea
13 before this interest -- this incident. That is generous to say
14 the least. We talked on the phone a couple of times. I made
15 it clear to Mr. Donaldson that it was the government's
16 position, number one, that he was not safety valve eligible
17 because he was a manager or a supervisor and, therefore,
18 anything he told us that he was not getting, in my view, a
19 safety valve departure.

20 Number two, yes, it would involve him having to
21 testify against Mr. Santiago because that's the only way he
22 could have gotten a departure. However, we never got to the
23 point as to whether or not Mr. Rivera was going to testify
24 against Mr. Santiago. As a matter of fact, the indications
25 were that he would not. We had -- and after I received this --

1 I just want to say that I got this late, Judge. The filings
2 weren't even given to me. I had to go to the clerk's office to
3 get this. After I got it, I went through my notes to determine
4 exactly what happened. In January --

5 MR. DONALDSON: I apologize, your Honor. But this
6 is one issue. I hand delivered this up to his office the same
7 day that I was down here. So --

8 THE COURT: That was no more than two days ago,
9 which was late to begin with, Mr. Donaldson.

10 MR. DONALDSON: Yes. Yes.

11 MR. BLOOMER: I'm referring to the motion to
12 continue, your Honor, where it lays it out in the affidavit
13 exactly what he alleged happened.

14 THE COURT: Okay.

15 MR. BLOOMER: The end of January I spoke with
16 Mr. Donaldson. We agreed to set up a meeting to determine
17 whether or not Mr. Rivera would come in for a meeting in early
18 September. Mr. Donaldson didn't come for that meeting. I'm
19 not sure what happened, but he didn't show up for the meeting.
20 I tried to call him on a number of different occasions, did not
21 get returned calls. Time went by. The end of March, my
22 understanding is I left the office for Friday. I come in on
23 Monday, I got a call from Chris Wylie saying the police paid
24 Mr. Rivera a visit. I called various police agencies, found
25 out that the Lowell police in fact responded to what I was told

1 were reports of unduly loud noise and neighbor complaints to
2 Mr. Rivera's parents' house. And when they responded, they
3 were surprised to see Mr. Rivera there. They thought that he
4 was held on pretrial detention. So I reported that to the
5 Court. I had no prior knowledge that that had occurred. And I
6 reported to Mr. Wylie exactly what happened.

7 I have no idea how this affects the sentence. I
8 really don't, Judge. There was no indication, and this Court
9 knows, not one person in this case cooperated. We had 12
10 defendants. Out of 12 defendants zero cooperated and they
11 expressed fear of Mr. Santiago and retribution had they
12 testified. All indications to me was that Mr. Rivera was not
13 going to testify. He was not interested in that. And, as a
14 matter of fact, the trial in this case started on October 15th
15 of 2006. October 12th was the day that I was informed that
16 Mr. Rivera was going to plea and that there would be no plea
17 agreement, that he was just going to plea straight up. I don't
18 understand how this visit from the police, even if it wasn't
19 proper, impacts sentencing.

20 I bring the Court back, Judge, to the facts of the
21 case and that this defendant was the primary -- and I say the
22 primary long-term customer of Mr. Santiago. The investigation,
23 in fact, began in response to complaints of drug dealing
24 involving Mr. Rivera and Mr. Santiago. That's how this whole
25 investigation began. When they execute a search warrant at the

1 end of the investigation, 180 grams of heroin, a finger
2 press -- this Court remembers, I'm sure, the expert, Trooper
3 Shapiro, demonstrating how that finger press worked, that black
4 finger press in his residence, latex gloves, actually boxes of
5 fingers that had been precut were found, a digital scale,
6 \$3,200 in cash.

7 Judge, this is a serious offense that demands, I
8 suggest, severe punishment. Ninety-seven months I suggest to
9 this Court is reasonable. Why do I say 97 months? Because
10 when I looked at the GSR based upon what I thought was the
11 appropriate weight and I compared to what probation came up
12 with, 97 months overlapped. In other words, for the base
13 offense level for 30 it was 97 to 121; for 28 it was 78 to 97.
14 And where he was found responsible for close to 700 grams of
15 heroin, I felt that 97 months was a fair and reasonable
16 sentence for this individual to serve given the severity of the
17 offense and his role in this offense.

18 And I would harken the Court to the sentences that
19 have been meted out today. That 97 months I suggest is
20 perfect. When we look at Santiago receiving 248 months; his
21 supplier, Juan Nunez, getting 151 months; another major
22 customer, Carlos Sanchez, getting 127 months; a career offender
23 getting 264 months. And then you have the lower level players
24 such as Zuleima Reyes getting 36 months; Torrez 36 months;
25 Pedro Miranda 72 months. The 97 months here for Mr. Rivera is

1 a fair and it is a reasonable sentence and it was one that will
2 promote respect for the law and it was one that will protect
3 the public from this defendant.

4 THE COURT: All right, thank you.

5 First, I am not going to enter a variant sentence
6 in this case. I do not see any grounds for an
7 outside-the-guidelines sentence. If the incident that occurred
8 in February '06 was as described by Mr. Donaldson, then perhaps
9 the parents or anyone else who was present that has a claim
10 against the Lowell Police Department under Section 1983, but to
11 me it does not impact this sentence in any way. The Court
12 will, therefore, sentence within the guidelines. I've already
13 heard the government's recommendation for sentencing within the
14 guidelines. I'll hear Mr. Donaldson briefly if he wishes to
15 address the Court.

16 MR. DONALDSON: Your Honor, if your Honor would
17 sentence him within reference to the advisory guidelines.
18 Again I would ask your Honor to take into consideration the
19 3553(a) considerations, your Honor, with respect to
20 Mr. Rivera's -- his overall issues with respect to him as a
21 person, your Honor.

22 But if we're just basically talking about the basic
23 advisory guideline sentence, I would suggest, your Honor, that
24 he be sentenced to the low range of the guidelines. And I
25 believe that the low range is 78 months. And I would ask for

1 that to be also consistent with the similarly situated other
2 defendants, your Honor.

3 I would also indicate that Mr. Torrado, who is also
4 considered to be one of the larger scale but on the same level
5 as Mr. Rivera, I believe that he got a five-year sentence.
6 That was by a plea agreement, your Honor. But the other
7 individual, he got a 72-month sentence. So I would suggest,
8 your Honor, that he would be -- that he would be given a
9 72-month sentence if your Honor was to go below -- if your
10 Honor was to go below, but to give a 78 if you weren't willing
11 to go below the sentence, your Honor. I would also ask that he
12 be given an opportunity to have credit for the drug program as
13 well.

14 THE COURT: All right. Does the defendant wish to
15 address the Court before sentence is imposed?

16 MR. DONALDSON: He had indicated to me, your Honor,
17 that he would like to address the Court. His father and his
18 wife also indicated that they would like to address the Court.

19 THE COURT: Well, I'm not going to hear from the
20 father and the wife. I will hear from the defendant.

21 THE DEFENDANT: I'd like to apologize to the
22 government, the United States, and to society at large for the
23 harm that I committed. I apologize to my family for the bad
24 times that I had them go through due to this situation, to ask
25 you, your Honor, that my punishment would be as lenient as

1 possible, not for me but for my children and my family, who we
2 all need each other. That will be all. Thank you.

3 THE COURT: Do counsel have any reason why sentence
4 ought not to be imposed at this time?

5 MR. BLOOMER: No, your Honor.

6 MR. DONALDSON: Not at this time, your Honor.

7 THE COURT: All right. The government in its brief
8 made a recommendation for a fine, Mr. Bloomer. Is there any
9 evidence that the defendant has the ability to pay a fine?

10 MR. BLOOMER: I leave that to the Court's
11 discretion, your Honor. At the time I wrote the sentencing
12 memo, I'm sure I looked at the PSR in arriving at that.

13 THE COURT: Well, I don't see a net worth that
14 warrants it, Mr. Bloomer, unless you know something I don't.

15 MR. BLOOMER: No, your Honor. No.

16 THE COURT: All right. Please stand, Mr. Rivera.

17 It is never a pleasure to sentence anybody to
18 incarceration, but the crime you committed deserves a severe
19 punishment. There will be people who will suffer other than
20 you as a result of this sentence, but the person that you
21 should blame for that is the one you see in the mirror, not
22 anyone else. Because any hardship that is caused to your
23 family, your parents, your children, your wife has been caused
24 by you, not by society, not by this Court, not by the
25 government, not by anyone else but you. The spreading of

1 heroin in the Lowell and Fitchburg area is just as bad as if
2 you had distributed poison to those people. Young people who
3 become addicts have no choice in the matter. You make them
4 dependent on this drug. You and anyone else that participate
5 in conspiracies to distribute this drug deserve to get thrown
6 in jail for a long period of time.

7 The only reason why I am going to not go to the
8 high end of the guideline is because I think you have shown an
9 ability when you apply yourself to be a decent human being and
10 to conduct yourself in a way that could be productive. You
11 apparently have had a good employment record for most of the
12 last 10 or 12 years. How you got involved in this or why you
13 got involved is totally unclear and unexcusable. But this is
14 the last clear chance you have. You're going to go to jail for
15 a long period of time, but you'll still be a young man when you
16 get out. You'll still have the opportunity to participate in
17 the society and do something good for your family and for the
18 people around you, but you're going to have a long time to
19 think about it. If you ever are in this court again on a
20 similar charge, you will go to jail for the rest of your life.
21 I hope you understand that.

22 Pursuant to the Sentencing Reform Act of 1984 and
23 having considered the sentencing factors enumerated in Title 18
24 of the United States Code Section 3553(a), it is the judgment
25 of this Court that you, Reynaldo Rivera, are hereby committed

1 to the custody of the Bureau of Prisons to be imprisoned for a
2 term of 88 months. This term consists of terms of 88 months on
3 each count to be served concurrently. The Court makes a
4 judicial recommendation that you participate in the Bureau of
5 Prisons' 500-hour residential drug abuse program.

6 Upon release from imprisonment, you shall be placed
7 on supervised release for a term of four years. This term
8 consists of terms of four years on each count, all such terms
9 to run concurrently. Within 72 hours of release from custody
10 of the Bureau of Prisons, you shall report in person to the
11 district to which you are released.

12 No fine is imposed based upon this Court's finding
13 that you are unable to pay a fine and are unlikely to become
14 able to pay a fine.

15 While on supervised release, you shall comply with
16 the following terms and conditions: First, you shall not
17 commit another federal, state or local crime and shall not
18 illegally possess a controlled substance. Second, you shall
19 refrain from any unlawful use of a controlled substance and
20 submit to one drug test within 15 days of release from
21 imprisonment and at least two periodic drug tests thereafter,
22 not to exceed 50 tests per year as directed by the probation
23 office. Third, you are to submit to the collection of a DNA
24 sample as directed by the probation office. Fourth, you shall
25 comply with the standard conditions that have been adopted by

1 this Court and are described in the Sentencing Guidelines at
2 Section 5D1.3(c) and will be set forth in detail in the
3 judgment and committal.

4 You are prohibited from possessing a firearm,
5 destructive device or other dangerous weapon. You are not to
6 consume any alcoholic beverages. You are to participate in a
7 program for substance abuse counseling as directed by the
8 United States probation office, which program may include
9 testing, not to exceed 50 tests per year, to determine whether
10 you have reverted to the use of alcohol or drugs. You shall be
11 required to contribute to the cost of services for such
12 treatment based upon your ability to pay or the availability of
13 third-party payment.

14 It is further ordered that you shall pay to the
15 United States a special assessment of \$600, which shall be due
16 and payable immediately.

17 Mr. Rivera, you have a right to appeal this
18 sentence. If you choose to appeal, you must do so within ten
19 days. If you cannot afford an attorney, an attorney will be
20 appointed on your behalf.

21 Do you understand that?

22 THE DEFENDANT: Yes.

23 THE COURT: Is there any further business to come
24 before the Court? Mr. Bloomer.

25 MR. BLOOMER: Four years supervised release, your

1 Honor?

2 THE COURT: Did I not say that?

3 MR. DONALDSON: That's what I heard.

4 THE COURT: I did say that, I believe. Four years
5 supervised release.

6 MR. BLOOMER: Nothing further, your Honor.

7 MR. DONALDSON: Your Honor, I have something.

8 THE COURT: Yes, Mr. Donaldson.

9 MR. DONALDSON: As part and parcel of Mr. Rivera's
10 pretrial release, his family put their house up. Do you
11 want -- should I by motion request that the lien on the
12 property be released?

13 THE COURT: Yes, that is done by motion. And the
14 motion when it is properly filed will be allowed.

15 MR. DONALDSON: Thank you, your Honor.

16 THE CLERK: The defendant is remanded to custody of
17 the U.S. Marshal. All rise.

18 (Adjourned, 4:49 p.m.)

19 - - - - -

20 CERTIFICATION

21 I certify that the foregoing is a correct
22 transcript of the record of proceedings in the above-entitled
23 matter to the best of my skill ability.

24 /s/ Shelly M Killian
25 Shelly M. Killian RPR, CM, CRR
Registered Professional Reporter
May 24, 2008